

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Bridging the Digital Divide for Low-Income Consumers)	WC Docket No. 17-287
)	
)	
Lifeline and Link Up Reform and Modernization)	WC Docket No. 11-42
)	
)	
Telecommunications carriers Eligible for Universal Service Support)	WC Docket No. 09-197
)	
)	

SMITH BAGLEY, INC. OPPOSITION TO PETITIONS FOR RECONSIDERATION

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SUMMARY

SBI endorses the Commission's decision in the *Lifeline Order* to make enhanced Tribal Lifeline support available only to facilities-based carriers operating on Tribal lands. Created nearly two decades ago, this additional support was primarily intended to provide an incentive for facilities-based carriers to invest in new infrastructure in unserved and underserved Tribal lands. The Commission's decision has wisely preserved this incentive, which will benefit Tribal consumers.

The Commission properly took up proposals that had been publicly aired in the comment process but were not addressed in the *2016 Lifeline Order*. Adopting a definition of facilities-based service was discussed in the record and was a logical outgrowth of a proposal set forth in the *2015 Lifeline FNPRM*. The record also supports the Commission's finding that facilities-based carriers are using enhanced Tribal Lifeline to accelerate deployment of facilities on Tribal Lands.

For SBI, enhanced Tribal Lifeline support is an essential component of its infrastructure budget on remote Tribal lands. Without Tribal Lifeline, SBI could not provide reasonably comparable mobile wireless service quality at an affordable price to consumers. Far from being based on the "hope" that carriers will build and maintain facilities on Tribal lands, as claimed by one petitioner seeking reconsideration of the *Lifeline Order*, enhanced Tribal Lifeline support is a portable subsidy that creates a powerful incentive for facilities-based carriers to invest in their networks and provide high-quality service at competitive prices. In fact, SBI has advocated for a

higher level of support to increase these incentives and more effectively address the unique challenges of serving remote Tribal areas.

SBI also supports the Commission’s decision to repeal its port freeze rules, which allowed carriers to lock their Lifeline customers into 60 days or 12 months of service, respectively, depending on whether the customer took voice or broadband Lifeline service. The Commission correctly concluded that the rule has not delivered the consumer benefits that were originally envisioned. Instead, as the Commission found, the port freeze rule has created incentives for providers to enroll consumers in “offerings that provide little meaningful residential broadband access while locking in their Lifeline benefit with that provider for the following 12 months.” At least on Tribal lands where it serves, SBI can attest to that finding. In addition, the rule’s repeal was proper because it did not address a demonstrated harm – indeed, the Wireless Petitioners concede that actual instances of abuse in the absence of the port freeze were “rare[.]”

Lastly, SBI notes that “premium Wi-Fi” through iPass hotspots is not a broadband solution in remote Tribal lands. Wi-Fi is not broadband, it is a short-range wireless technology to deliver broadband. Moreover, iPass hotspots are virtually nonexistent in the Tribal areas SBI serves. They simply do not compare in coverage or quality to hundreds of commercial mobile cell sites provisioned by SBI. While SBI is aware of a number of (non-iPass) Wi-Fi hotspots at chapter houses, for example, Wi-Fi that is available to the public for free negates the claim that resellers are delivering anything of value when selling “premium” Wi-Fi access. Accordingly,

even if the FCC reverses course and declares Wi-Fi to be BIAS, its qualification as a Lifeline service should be restricted on remote Tribal lands where Wi-Fi is not readily available.

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SMITH BAGLEY, INC. OPPOSITION TO PETITIONS FOR RECONSIDERATION

Smith Bagley, Inc. (“SBI”), by its counsel, hereby opposes the Petitions for Reconsideration filed by the Oceti Sakowin Tribal Utility Authority (“OSTUA”) (“OSTUA Petition”) and by Telrite Corporation d/b/a Life Wireless (“Telrite”), i-wireless, LLC (“i-wireless”) and AmeriMex Communications Corp. d/b/a SafetyNet Wireless (“SafetyNet”) (collectively, the “Wireless Petitioners”) (“Wireless Petition”), on February 15, 2018, requesting reconsideration of several decisions set forth in the Commission’s *Fourth Report and Order*, *Order on Reconsideration*, *Memorandum Opinion and Order*, *Notice of Proposed Rulemaking*, and *Notice of Inquiry*, in the above-captioned proceedings.¹

¹ *Bridging the Digital Divide for Low-Income Consumers*, *Lifeline and Link Up Reform and Modernization*, *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket No. 17-287, WC Docket No. 11-42, WC Docket No. 09-197, *Fourth Report and Order*, *Order on Reconsideration*, *Memorandum Opinion and Order*, *Notice of Proposed Rulemaking*, and *Notice of Inquiry*, 32 FCC Rcd 10475 (2017) (referred to herein as “*Lifeline Order*”). This opposition is

I. INTRODUCTION AND BACKGROUND.

For nearly two decades, SBI has advocated on behalf of consumers in Tribal lands it serves in the “Four Corners” area of Arizona, New Mexico, Utah, and Colorado. SBI has built extensive commercial mobile wireless coverage, providing service to over 100,000 people, over 60,000 of whom live in low-income households on the Navajo, Hopi, White Mountain Apache, Zuni, and Ramah Navajo Tribal lands. SBI has been able to leverage its wireless infrastructure that the Lifeline Program has supported in the Four Corners area to serve dozens of schools and hospitals located in remote areas – delivering access that would not have been available otherwise.

The Commission’s *Lifeline Order* significantly revamps Lifeline program eligibility on Tribal lands. SBI endorses the Commission’s decision to make enhanced Tribal Lifeline support available only to facilities-based carriers operating on Tribal lands, because the extra funding made available some 18 years ago was intended, in large part, to provide an incentive for carriers to invest in new infrastructure in unserved and underserved Tribal lands.

SBI also supports the Commission’s decision to repeal its port freeze rules, which allowed carriers to lock their Lifeline customers into 60 days or 12 months of service, respectively, depending on whether the customer took voice or broadband Lifeline service. Like the Commission, SBI initially supported the rule but now believes that the evidence shows that its repeal has been made necessary by, among other things, the rule’s susceptibility to abuse by Lifeline providers.

timely. *See Petitions for Reconsideration of Action in Rulemaking Proceeding*, Doc. No. 2018-04359, 83 FR 8962 (Mar. 2, 2018).

II. THE COMMISSION'S DECISION TO LIMIT ENHANCED TRIBAL LIFELINE WAS PERMISSIBLE UNDER THE APA.

OSTUA states that the Commission “unilaterally, and without notice”² failed to provide adequate notice and comment as required under the Administrative Procedure Act (“APA”).³ On the contrary, the Commission proceeded properly by taking up proposals that had been publicly aired in the comment process in the rulemaking leading to adoption of the *2016 Lifeline Order*, but were not addressed in that *Order*.

In its *2015 Lifeline FNPRM*, the Commission proposed to “limit enhanced Tribal Lifeline and Link Up support only to those Lifeline providers who have facilities.”⁴ As the Commission noted in the *Lifeline Order*, a number of parties filed comments in response, most in favor of the proposal, but some in opposition.⁵ In its *2016 Lifeline Order*, the Commission took several steps to reform the Lifeline program, but declined to act on some proposals, including limiting enhanced Tribal Lifeline to facilities-based carriers, stating, “[t]hese and other issues for which the Commission has sought comment and which are not addressed in this order, remain open

² OSTUA Petition at p. 6.

³ 5 U.S.C. §§ 500 *et seq.*

⁴ *Lifeline and Link Up Reform and Modernization et al.*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818, 7875, para. 167 (2015) (*2015 Lifeline FNPRM*).

⁵ According to the *Lifeline Order*, fourteen parties commented in favor of the proposal, while four weighed in against it. See *Lifeline Order*, *supra*, at para. 27 n. 67, and para. 28 n. 68.

for consideration in a future proceeding more comprehensively focused on advancing broadband deployment on Tribal lands.”⁶

As set forth above, the *2015 Lifeline FNPRM* discussed the reasons why limiting Tribal Lifeline support to facilities-based carriers should be adopted, and specifically proposed doing so. The fact that hundreds of comments and replies were filed in response, many addressing that specific proposal, “provide evidence that the notice was adequate.” *Leyse v. Clear Channel Broadcasting, Inc.*, 545 Fed. Appx. 444, 454 (6th Cir. 2013).⁷

Even if there was less than perfect compliance with the notice-and-comment requirements of the APA, which there was not, “any error – if error there was – was plainly harmless.” *United States Telecom Ass’n v. FCC*, 400 F.3d 29, 41 (D.C. Cir. 2005). OSTUA has now had the opportunity to address the issue. There is no need for the issuance of another NPRM.

OSTUA also claims that the Commission’s definition of “facilities-based” service is not a logical outgrowth of the *2015 Lifeline FNPRM*.⁸ Yet, the Commission’s *2015 Lifeline FNPRM* proposed to limit support “to only those Lifeline providers who have facilities,” laying out several possible approaches, and inviting comment.⁹ The Commission’s entire discussion of this matter focused on using Lifeline support to promote infrastructure investment, in

⁶ *Lifeline and Link Up Reform and Modernization et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 4038, para. 211 (2016) (*2016 Lifeline Order*). See *Lifeline Order* at para. 2 n. 1.

⁷ See *Lifeline Order*, *supra*, at para. 27 n. 67, and para. 28 n. 68.

⁸ OSTUA Petition at p. 6.

⁹ *2015 Lifeline FNPRM*, *supra*, 30 FCC Rcd at 7875, paras. 167-168.

furtherance of long-established precedent relating to the Commission’s Tribal Lifeline program, and relating to the Commission’s definition of “facilities.”

In the case of wireless technology, it is axiomatic that, for a carrier to qualify as providing facilities-based service, it must have access to spectrum. In an *ex parte* presentation last October,¹⁰ SBI urged the Commission to define “facilities-based” consistent with the FCC’s Form 477 instructions, which state:

Facilities-Based Mobile Voice Provider: A mobile voice provider is considered facilities-based if it serves a subscriber using its own network facilities *and spectrum for which it holds a license*, manages, or for which it has obtained the right to use via a spectrum leasing arrangement (emphasis added).¹¹

Adopting a definition of facilities-based service was a logical outgrowth of a proposal set forth by the Commission in the *2015 Lifeline FNPRM*. The definition was discussed in the record, including specifically the inclusion of a spectrum requirement.

III. ENHANCED TRIBAL LIFELINE SUPPORT IS AN ESSENTIAL COMPONENT OF INFRASTRUCTURE INVESTMENT ON REMOTE TRIBAL LANDS.

OSTUA asserts that the record does not support a finding that facilities-based carriers are using Tribal Lifeline support for the deployment of facilities on Tribal Lands. It claims support is being used to discount service to consumers.¹² Here, SBI does not speak for other

¹⁰ Letter from David LaFuria, Counsel to Smith Bagley, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-42 and GN Docket No. 17-199 (filed Oct. 20, 2017) (“October 2017 SBI Ex Parte”).

¹¹ *FCC Form 477 Local Telephone Competition and Broadband Reporting Instructions*, at p. 8, accessed at <https://transition.fcc.gov/form477/477inst.pdf>, cited in October 2017 SBI Ex Parte.

¹² OSTUA Petition at p. 7.

carriers, but is constrained to note that it placed into the record a wealth of data and first-hand statements concerning its experience on Tribal lands. *See, e.g.*, SBI's Comments in response to the 2015 Lifeline NPRM:

As SBI has consistently stated over many years, it is the Lifeline program that spurred investment resulting in SBI's network on Tribal lands. Without Lifeline, High Cost program funds would have languished because no carrier will build a network in areas where consumers cannot afford to purchase service.¹³

Lifeline support is absolutely critical to maintaining service on existing towers, including those in remote areas that generate very little traffic.¹⁴

SBI has also entered into the record substantial data demonstrating how, over the years, its network has grown to over 200 cell sites,¹⁵ it has installed new switching and backhaul equipment, and it has made upgrades to 3G and now 4G LTE technology, in large part due to Tribal Lifeline.¹⁶ The extra \$25.00 per month, an amount that SBI's customers cannot afford to pay, has been responsible for many of SBI's capital investments. Without Tribal Lifeline, there does not appear to be any business model for providing mobile wireless service quality, that is

¹³ Lifeline and Link Up Reform and Modernization, Comments of Smith Bagley, Inc., WC Docket No. 11-42, (filed Aug. 31, 2015) at p. 14.

¹⁴ *Id.* at p. 18.

¹⁵ Today, SBI operates from 235 locations.

¹⁶ *See, e.g.*, Letter from David LaFuria, Counsel to Smith Bagley, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-42 (filed Mar. 14, 2016) ("March 2016 SBI Ex Parte"); Letter from David LaFuria to Marlene H. Dortch, WC Docket Nos. 10-90, 10-208 (filed Feb. 13, 2017); Letter from David LaFuria, Counsel to Smith Bagley, Inc., to Marlene H. Dortch, WC Docket Nos. 10-90, 10-208 (filed Oct. 26, 2016).

reasonably comparable to service quality available to urban consumers, on most of SBI's Tribal lands at an affordable price to consumers.

Eighteen years ago, the Commission enacted Tribal Lifeline to incentivize carriers to invest in facilities-based service on Tribal lands.¹⁷ Tribal lands lacking adequate facilities need enhanced Tribal Lifeline to build and maintain modern networks. If there are urban Tribal lands, such as, for example, Oklahoma City, where multiple unsupported carriers have built infrastructure delivering access to high-quality telecommunications and information services, then enhanced Tribal Lifeline support would appear to be unnecessary. Indeed, in terms of telecommunications facilities investment, Oklahoma City looks a lot more like our nation's other cities, as opposed to remote Tribal lands that SBI serves.

OSTUA asserts that enhanced Tribal Lifeline is provided based on the FCC's "hope" that carriers build and maintain facilities on Tribal lands.¹⁸ Not so. Tribal Lifeline support is available to any other market entrant that can build facilities to compete (which, in SBI's case on the Navajo Nation, has happened). The benefit is portable, meaning that each participant must

¹⁷ See *Federal-State Joint Board on Universal Service*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12213 (2000) ("We adopt measures at this time to promote telecommunications deployment and subscribership for the benefit of those living on federally-recognized American Indian and Alaska Native tribal lands, based on the fact that American Indian and Alaska Native communities, on average, have the lowest reported telephone subscribership levels in the country. Toward this end, we adopt amendments to our universal service rules and provide additional, targeted support under the Commission's low-income programs **to create financial incentives for eligible telecommunications carriers to serve, and deploy telecommunications facilities in, areas that previously may have been regarded as high risk and unprofitable.**") (emphasis added, footnotes omitted).

¹⁸ OSTUA Petition at p. 9.

provide high-quality service or risk losing the customer's revenue, as well as Lifeline support. Importantly, Lifeline support in any area is limited by consumers: if a competitor enters and captures half of the market, the amount of Tribal Lifeline support does not increase, but moves among competing carriers. As a result, Tribal Lifeline is a powerful incentive for facilities-based carriers to invest in their networks and provide high-quality service at competitive prices so as to retain customers.

Accordingly, SBI supports the Commission's effort to target Tribal Lifeline support to remote Tribal lands that need investment in telecommunications infrastructure. In fact, SBI has urged the Commission to increase the amount of enhanced Tribal Lifeline in remote areas to increase incentives for all carriers to enter markets that have for decades been underserved.¹⁹ SBI respectfully suggests that, rather than reversing the Commission's decision to limit Tribal Lifeline to facilities-based carriers, issues raised by OSTUA concerning how best to provide service to Tribal lands should be addressed in the pending notice set forth in the *2017 Lifeline Order*.²⁰

IV. THE COMMISSION'S REPEAL OF THE PORT FREEZE RULE WAS JUSTIFIED

The Commission was justified in repealing both the 60-day port freeze for voice-only service and the 12-month port freeze for broadband and bundled voice-and-broadband service. By the Wireless Petitioners' own admission, the purported abuse the rules intended to address occurred only infrequently before the freeze was implemented. The Commission correctly

¹⁹ See *March 2016 SBI Ex Parte*, *supra*.

²⁰ See *2017 Lifeline Order*, 32 FCC Rcd at 10495, para. 53 *et seq.* (Notice of Proposed Rulemaking).

concluded that the rule “has not delivered the consumer benefits the Commission envisioned ..., but instead has incented certain providers to enroll consumers in offerings that provide little meaningful residential broadband access while locking in their Lifeline benefit with that provider for the following 12 months.”²¹ No persuasive arguments have been presented that would call these conclusions into question; accordingly, the Commission should affirm its repeal of the port freeze rules.

The port freeze rule “ultimately disadvantages Lifeline consumers” because it “limits [their] ability to seek more competitive offerings and obtain those services that best meet their needs.”²² In SBI’s experience, the port freeze has negatively impacted consumers in its service area. For example, SBI has seen numerous instances where SBI customers visit an urban area, such as Farmington, New Mexico, and transfer to a competitor’s Lifeline service based upon a promotional offering. Upon returning to their homes in the rural areas SBI serves, these customers find that their phones, which may have worked satisfactorily in Farmington, no longer can access service several miles outside of the town.

Oftentimes, these customers believe they are still SBI customers, and they enter SBI stores with complaints that their service does not work. SBI is forced to explain that the customers have (purposefully or otherwise) enrolled for service with another company and are now blocked from returning to SBI because of the port freeze. As a result, the customers are stuck with service that they cannot use until the freeze period expires. Many times, the

²¹ *Id.* at para. 38.

²² *Id.* at para. 35.

customers cannot easily get proper redress from their new carrier, because the agents used by that carrier have literally folded their tents, decamped, and not provided the carrier's new customers with adequate contact information for lodging complaints.

The Wireless Petition undermines its own argument that the port freeze rules were necessary to "minimize costs and protect program integrity"²³ While the absence of a port freeze creates the potential for customers to "flip" their Lifeline service multiple times in the same month, the Wireless Petitioners concede that actual instances of this happening were "rare[.]"²⁴ Yet even rare instances of fraud, the Wireless Petitioners argue, can result in a "perception of waste and fraud in the Lifeline program."²⁵ The Wireless Petitioners add that media reports of these rare instances "were the impetus for many of the previous reforms in the Lifeline program."²⁶ It is simply not reasonable to burden carriers and consumers with regulations if they are aimed primarily at staving off bad publicity, as the Wireless Petitioners seem to allege.

Instead of creating a proliferation of competitive offerings, the port freeze has often served to cut off the exit for consumers who wish to abandon a new service after discovering it is not remotely what they need or desire. Accordingly, the Commission correctly concluded

²³ Wireless Petition at p. 3.

²⁴ *Id.* at p. 6.

²⁵ *Id.*

²⁶ *Id.*

that “the disadvantages to consumers of the port freeze rule, in practice, outweighed the anticipated advantages[.]”²⁷

V. “PREMIUM Wi-Fi” IS PRACTICALLY NONEXISTENT IN MANY RURAL TRIBAL AREAS.

Wireless Petitioners seek to preserve broadband service via Wi-Fi, which is not broadband Internet access service (“BIAS”).²⁸ It is a technology for extending BIAS over very short distances. Nor is it a substitute for BIAS on remote Tribal lands. Moreover, branding Wi-Fi on remote Tribal lands as “premium”²⁹ is a misnomer. iPass hotspots in a remote area do not compare in coverage or quality to hundreds of cell sites provisioned by SBI and other commercial wireless carriers.

Notwithstanding Wireless Petitioners’ reference to the iPass network of 34 million hotspots nationwide,³⁰ it appears that Wi-Fi on an iPass hotspot as described by the Wireless Petitioners is almost non-existent to residents of the Navajo, White Mountain Apache, Zuni, or Hopi nations. For example, a search on the iPass hotspot finder for the following Navajo towns reveals: Kayenta, AZ, one (McDonald’s);³¹ the capital of Window Rock, AZ, one (McDonald’s);³²

²⁷ *Lifeline Order* at para. 35.

²⁸ Wireless Petition at p. 13.

²⁹ See, e.g., *id.* at p. 14 and n.32.

³⁰ See *id.* at p. 20.

³¹ *iPass Notspot Finder*, accessed at <http://hotspot-finder.ipass.com/united-states/kayenta-arizona>.

³² *Id.*, accessed at <http://hotspot-finder.ipass.com/united-states/window-rock-arizona>.

Keams Canyon, AZ, zero;³³ Ganado, AZ, zero;³⁴ Chinle, AZ, zero;³⁵ Tuba City, AZ, one (McDonald's);³⁶ Shiprock, NM, one (McDonald's);³⁷ Crownpoint, NM, zero;³⁸ Whiteriver, AZ, zero;³⁹ Fort Apache, AZ, zero;⁴⁰ Cibecue, AZ, zero;⁴¹ Mexican Hat, UT, zero;⁴² and Aneth, UT, zero.⁴³ This is a far cry from Telrite's claim that the service "permits seamless handoff between hotspots."⁴⁴

To give some sense of distance, it is 74 miles between iPass hotspots in Kayenta and Tuba City. If you live anywhere within the 156 miles between Tuba City and Window Rock, Arizona, there's not a single iPass hotspot. Not one iPass hotspot for the residents of Hotevilla-Bacavi, Kykotsmovi Village, or Keams Canyon (all on the Hopi Nation), or Steamboat, Burnside, or Ganado on the Navajo Nation.

³³ *Id.* accessed at <http://hotspot-finder.ipass.com/united-states/keams-canyon-arizona>.

³⁴ *Id.* accessed at <http://hotspot-finder.ipass.com/united-states/ganado-arizona>.

³⁵ *Id.* accessed at <http://hotspot-finder.ipass.com/united-states/chinle-arizona>.

³⁶ *Id.* accessed at <http://hotspot-finder.ipass.com/united-states/tuba-city-arizona>.

³⁷ *Id.* accessed at <http://hotspot-finder.ipass.com/united-states/shiprock-new-mexico>.

³⁸ *Id.* accessed at <http://hotspot-finder.ipass.com/united-states/crownpoint-new-mexico>.

³⁹ *Id.* accessed at <http://hotspot-finder.ipass.com/united-states/whiteriver-arizona>.

⁴⁰ *Id.* accessed at <http://hotspot-finder.ipass.com/united-states/fort-apache-arizona>.

⁴¹ *Id.* accessed at <http://hotspot-finder.ipass.com/united-states/cibecue-arizona>.

⁴² *Id.* accessed at <http://hotspot-finder.ipass.com/united-states/mexican-hat-utah>.

⁴³ *Id.* accessed at <http://hotspot-finder.ipass.com/united-states/aneth-utah>.

⁴⁴ Wireless Petition at p. 18. See also *id.* at p. 14 n.32.

Moreover, SBI is aware of a number of public Wi-Fi hotspots (not iPass-affiliated) located at chapter houses scattered throughout Tribal lands that SBI serves. On information and belief, all of these hotspots are available for free, negating the idea that resellers are delivering anything of value when selling “premium” Wi-Fi access on these Tribal lands.

Bottom line, low-income consumers, who may not be well-informed regarding the difference between Wi-Fi and commercial mobile broadband, should not be told they are getting a “premium service” that is available free at a nearby chapter house, or a McDonald’s restaurant located perhaps 70 miles away.⁴⁵ Accordingly, even if the FCC reverses field and declares Wi-Fi to be BIAS, its qualification as a Lifeline service should be restricted on remote Tribal lands, and any other rural area where Wi-Fi is not readily available.

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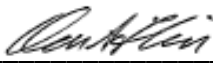
⁴⁵ See McDonald’s Wi-Fi Policy at: <https://www.mcdonalds.com/us/en-us/services/free-wi-fi.html>.

VI. CONCLUSION.

SBI urges the Commission to deny the petitions for reconsideration submitted by OSTUA and the Wireless Petitioners and proceed with Lifeline reforms focused on low-income Tribal families.

Respectfully submitted,

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